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In the

Supreme Court of the United States

October Term, 1997

COLLEEN V. FORD,

Petitioner,

-v-

SCHERING-PLOUGH CORPORATION;
SCHERING CORPORATION;
METROPOLITAN LIFE INSURANCE COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

This petition for a writ of certiorari, brought under the Americans With Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* (hereinafter "ADA"), challenges the lawfulness of a private entity offering long-term disability insurance that provides lesser benefits to qualified individuals with **mental** disabilities than are provided under the same plan to those with **physical** disabilities. The disability-based nature of this distinction presents this Court with the following questions:

I. Whether Title III of the ADA prohibits discrimination against qualified individuals with disabilities in the contents of goods and services, including insurance products, offered by a "public accommodation", as well as the manner in which such goods and services are accessed.

II. Whether the ADA prohibits discrimination in a disability insurance plan in the benefits offered to mentally and physically disabled individuals covered under the same plan.

III. Whether Title V of the ADA requires a private entity offering disability insurance to support a disability-based distinction made in its insurance product with competent evidence that the distinction is consistent with sound actuarial principles, reasonably anticipated experience, and bona fide risk classifications.

Parties to the Proceedings

The Petitioner, Colleen V. Ford (hereinafter "Petitioner" or "Ford"), is a New Jersey resident. Petitioner was the Plaintiff before the United States District Court for the District of New Jersey, and the Appellant before the United States Court of Appeals for the Third Circuit.

Respondent Metropolitan Life Insurance Company (hereinafter "MetLife") is an insurance company doing business in the State of New Jersey. Respondents Schering-Plough Corporation, and Schering Corporation (collectively "Schering-Plough") are corporations doing business in the State of New Jersey. All Respondents were the Defendants before the United States District Court for the District of New Jersey, and the Appellees before the United States Court of Appeals for the Third Circuit.

There are no other parties to this action.

Table of Contents

	Page
Questions Presented for Review	i
Parties to the Proceedings	ii
Table of Contents	iii
Table of Authorities	vi
Citations of Opinions and Orders	1
Basis for Jurisdiction in This Court	1
Statutes in Question	1
Statement of the Case	2
Argument in Support of Petition	4
I. The Third Circuit's Strict Construction That Title III of the ADA Affords Disabled Individuals With Only Equal Physical Access to "Public Accommodations", such as Insurance Offices, Directly Conflicts with the First Circuit, as well as the Department of Justice's Regulations and Interpretation of the ADA, Holding That the ADA Covers Access to Insurance Through Public Accommodations Other Than Physical Structures, and That it Prohibits Discrimination Based On Disability Not Only in How the Goods and Services of Insurance Offices are Accessed, but also in the Terms and Conditions of Those Goods and Services	4

A. The Third Circuit's Holding that Title III of the ADA Only Refers to Equally Accessing Public Accommodations Which are Physical Places or Structures Splits with the First Circuit's Holding on This Issue. 5

B. The Third Circuit's Narrow Interpretation of Title III to Exclude the Terms and Conditions of Disability Benefits Provided by A Public Accommodation (*i.e.*, an insurance office) is Contrary to the First Circuit's Decision in *Carparts*, and the Department of Justice's Interpretation of Title III. 9

II. The Third Circuit's Holding That the ADA is Not Violated By Disparities in Benefits Between Mentally and Physically Disabled Individuals Insured Under the Same Plan, Which is Plainly a Disability-Based Distinction, is Contrary to the ADA's Express Purpose Prohibiting Such Distinctions From Being Made. .. 15

III. The Third Circuit's Decision That Title V of the ADA Does Not Require a Disability Insurer to Justify its Disability-Based Distinction in Insurance Benefits With Competent Evidence Contravenes the Legislative History, and Interpretive Case Law, Underlying the ADA Which Expressly Require This Evidentiary Support. 21

Conclusion 30

Appendix

Exhibit A - Circuit Court Opinion (Filed May 22, 1998) 1a

Exhibit B - District Court Order (Dated September 12, 1996) 37a

Exhibit C - Circuit Court Judgment (Dated May 22, 1998) 48a

Exhibit D - Order Denying Rehearing (Dated June 30, 1998) 50a

Exhibit E - Statutes Involved (Rule 14.1(f)) 51a

Table of Authorities

Page

Cases

Alexander v. Choate, 469 U.S. 287 (1985) 18, 19

Anderson v. Gus Mayer Boston Store, 924 F. Supp. 763 (E.D. Tex. 1996) 13, 25

Attar v. Unum Life Ins. Co., 1997 WL 446439 at *11-12 (N.D. Tex. 1997) 13

Baker v. Hartford Life Ins. Co., 1995 WL 573430 (N.D. Ill. 1995) 7, 13, 25

Bragdon v. Abbott, 118 S. Ct. 2196, 2202 (1998) 19

Carparts Dist. Ctr., Inc. v. Automotive Wholesalers Assoc. of New England, Inc., 37 F.3d 12 (1st Cir. 1994) 5, 6, 9, 10, 11, 13

Chabner v. United Omaha Life Ins. Co., 994 F. Supp. 1185 (N.D. Cal. 1998) 13

Cloutier v. Prudential Ins. Co. of Am., 964 F. Supp. 299 (N.D. Cal. 1997) 11, 13, 25

Doukas v. Metropolitan Life Insurance Co., 950 F. Supp. 422 (D.N.H. 1996) 7, 10, 13, 25

EEOC v. CNA Ins. Co., 96 F.3d 1039 (7th Cir. 1996) 20

EEOC v. Commercial Office Products Co., 486 U.S. 107, 115 (1988) 28

Ford v. Schering-Plough Corp. et al., Case No. 96-1991 (D.N.J. 1996) 1

Ford v. Schering-Plough Corp. et al., 145 F.3d 601 (3d Cir. 1998); *reh'g denied*, ... 1

Ford v. Schering-Plough Corp. et al., Case No. 96-5674 (3d Cir. June 30, 1998) 1

Gomez v. Toledo, 446 U.S. 635, 639 (1980) 8

Innovative Health Sys., Inc. v. City of White Plains, 117 F.3d 37, 45 n.8 (2d Cir. 1997) 14

Jefferson County Pharmaceutical Assn v. Abbott Labs., 460 U.S. 150, 159 (1983) 8

Kotev v. First Colony Life Ins. Co., 927 F. Supp. 1316 (C.D. Cal. 1996) 7, 12, 13, 22, 24

Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674 (8th Cir. 1996) 19, 20

Lewis v. Aetna Life Ins. Co., 982 F. Supp. 1158 (E.D. Va. 1997) 13, 24

Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1015 (6th Cir. 1997) 9, 12, 19

Parker v. Metropolitan Life Ins. Co., 875 F. Supp. 1321 (W.D. Tenn. 1995) 20

Piquard v. City of East Peoria, 887 F. Supp. 1106 (C.D. Ill. 1995) 13, 25

Price Waterhouse v. Hopkins, 490 U.S. 228, 239-45 (1989) 16

Public Employees Retirement Sys. of Ohio v. Betts, 492 U.S. 158 (1989) 27

Robinson v. Shell Oil Co., 70 F.3d 325 (4th Cir. 1995) 20

Robinson v. Shell Oil Co., 117 S. Ct. 843 (1997) 20

Stoutenborough v. National Football League, Inc., 59 F.3d 580, 583 (6th Cir. 1995) 9

Traynor v. Turnage, 485 U.S. 535 (1988) 18

United States v. Alaska, 117 S. Ct. 1888, 1918 (1997) 5

United States v. Morton, 467 U.S. 822, 834 (1984) 14

World Ins. Co. v. Branch, 966 F. Supp. 1203(N.D. Ga. 1997) 13, 24

Other Authorities

Dept. of Justice, *Title III Technical Assistance Manual: Covering Public Accommodations and Commercial Facilities*, § III-3.11000, at 19 (Nov. 1993) 13

EEOC Interim Guidance, Daily Lab. Rep. (BNA) No. 109 at E-2 28

H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2 at 99 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 382 4

H.R.Rep. No. 485, 101st Cong., 2d Sess. at 71 24

S. Rep. No. 116, 101st Cong., 1st Sess. at 29 17

S.Rep.No. 116, 101st Cong., 1st Sess. at 84-86 24

Webster's Third New International Dictionary 16

Rules and Regulations

12 C.F.R. § 36.212 22
F. R. C. P. 12(b)(6) 3

Statutes

15 U.S.C. § 1012(b) 12
28 U.S.C. § 1254(1) 1
29 U.S.C. §§ 621-34 27
42 U.S.C. § 12101(b)(1),(4) 16
42 U.S.C. § 12102(2) 20
42 U.S.C. § 12112(a) 16, 19
42 U.S.C. § 12112(b)(2) 28
42 U.S.C. § 12181(7) 8
42 U.S.C. § 12182(a) 5
42 U.S.C. § 12182(b)(1)(A)(i) 16
42 U.S.C. § 12201(c) 12, 21, 22, 24
42 U.S.C. § 12201(c)(1) 25
42 U.S.C. § 2000e-2(a)(1) 19

Opinions Below

The opinion of the Third Circuit (App., *infra*, 1a) is reported as *Ford v. Schering-Plough Corp. et al.*, 145 F.3d 601 (3d Cir. 1998); *reh'g denied, Ford v. Schering-Plough Corp. et al.*, Case No. 96-5674 (3d Cir. June 30, 1998) (App., *infra*, 50a). The unreported decision of the district court (App., *infra*, 37a) is cited as *Ford v. Schering-Plough Corp. et al.*, Case No. 96-1991 (D.N.J. 1996).

Basis for Jurisdiction in this Court

The United States Court of Appeals for the Third Circuit entered its judgment on May 22, 1998. The order of the United States Court of Appeals for the Third Circuit denying a petition for rehearing in banc was entered on June 30, 1998. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

The Statutes in Question

42 U.S.C. §12101(b)
42 U.S.C. §12102(2)
42 U.S.C. §12112(a)
42 U.S.C. §12112(b)
42 U.S.C. §12181(7)(F)
42 U.S.C. §12182(a)
42 U.S.C. §12182(b)
42 U.S.C. §12201(c)

(*See* Exhibit E)

Statement of the Case

This petition for a writ of certiorari should be granted to resolve a question of exceptional importance: whether a complaint alleging violations of the Americans with Disabilities Act ("ADA") may be dismissed, as a matter of law, where an employer-sponsored long term disability insurance plan accords less favorable benefits to mentally disabled employees than to physically disabled employees. The importance of this question, which implicates the significant remedial policies underlying the ADA, is heightened by the split in the circuits which have addressed identical and very similar issues thus far. The Sixth and Seventh Circuits, and a panel of the Third Circuit, have determined that such a distinction does not violate the ADA (although not without a strong dissent from the Chief Judge of the Sixth Circuit), while the First Circuit (and a District Court within the Fourth Circuit) have allowed such claims to proceed.

Petitioner was an employee of Schering-Plough from 1975 until May of 1992, when she became totally disabled due to a mental impairment. During her employment, petitioner enrolled in a long-term disability benefits plan provided by Schering-Plough through MetLife. Although the plan provided benefits for a **physically disabled** employee until such employee reached the age of 65, it imposed a cap of two years on benefits for a **mentally disabled** employee who was not hospitalized. Petitioner was mentally disabled and not hospitalized. Consequently, the long-term disability coverage provided to her by Schering-Plough and MetLife expired in 1994, two years after it began.

By complaint filed on April 29, 1996, Petitioner brought suit under Titles I, III, and V of the ADA based upon the Respondents' discrimination against individuals

with "mental or nervous" disabilities (as defined and interpreted by Respondents Schering-Plough and Metlife) in the provision of long-term disability benefits. On September 12, 1996, the District Court for the District of New Jersey granted the Respondents' motion to dismiss Petitioner's complaint under Federal Rule of Civil Procedure 12(b)(6).

Petitioner appealed to the Third Circuit, and a three judge panel reversed the district court decision as to Petitioner's standing by holding that although Petitioner was no longer able to work when her long-term disability coverage was terminated, she nevertheless was a "qualified individual with a disability" under Title I of the ADA who met its threshold requirements. (App., *infra*, 12a-13a). Despite holding that Petitioner was eligible to sue for discrimination under Title I of the ADA, the Third Circuit concluded that Petitioner did not state a claim under the ADA because the statute "does not require equal coverage for every type of disability; such a requirement, if it existed, would destabilize the insurance industry in a manner definitely not intended by Congress when passing the ADA." (App., *infra*, 15a). The majority also concluded that Petitioner failed to state a claim under Title III of the ADA because this title governs only access to the **physical structure** of a "public accommodation", an interpretation of Title III which creates a split in the circuits by parting with the First Circuit, while effectively excluding insurance contracts from the scrutiny of the ADA. (App., *infra*, 28a).

Finally, the Third Circuit held that disability insurers are not required by the ADA to support their disability-based insurance decisions with competent evidence. (App., *infra*, 20a-24a). On June 30, 1998, Ford's petition for rehearing *en banc* was denied by the Third Circuit. (App., *infra*, 50a).

Argument in Support of Petition

I. The Third Circuit's Strict Construction That Title III of the ADA Affords Disabled Individuals With Only Equal Physical Access to "Public Accommodations", such as Insurance Offices, Directly Conflicts with the First Circuit, as well as the Department of Justice's Regulations and Interpretation of the ADA, Holding That the ADA Covers Access to Insurance Through Public Accommodations Other Than Physical Structures, and That it Prohibits Discrimination Based On Disability Not Only in How the Goods and Services of Insurance Offices are Accessed, but also in the Terms and Conditions of Those Goods and Services.

A primary purpose of Title III of the ADA is "to bring individuals with disabilities into the economic and social mainstream of American life . . . in a clear, balanced and reasonable manner." H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2 at 99 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 382. To achieve this remedial purpose, the Title III of the ADA provides that:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases or leases to, or operates a place of public accommodation.

42 U.S.C. § 12182(a). The Third Circuit applied an overly restrictive interpretation of these remedial provisions to arrive at a conclusion contrary to the statute's intent.

A. The Third Circuit's Holding that Title III of the ADA Only Refers to Equally Accessing Public Accommodations Which are Physical Places or Structures Splits with the First Circuit's Holding on This Issue.

The Third Circuit narrowly construed the broad "public accommodations" language of Title III to apply only to physically accessing places or structures. (App., *infra*, 24a-29a). This "[r]estricting" and "[c]onfining" interpretation of a Title III "public accommodation" belies the ADA's remedial intent. (App., *infra*, 26a-27a). Moreover, this narrow construction splits with the First Circuit's interpretation that the ADA requires a broad construction of "public accommodation." *See Carparts Dist. Ctr., Inc. v. Automotive Wholesalers Assoc. of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994); (*see also* App., *infra*, 28a).

Congress worded Title III more broadly to guarantee the full and equal enjoyment not only of public accommodations, but also of the "goods, services, . . . privileges [and] advantages" of any place of public accommodation. 42 U.S.C. § 12182(a). Interpreting Title III to guarantee only physical accessibility to public accommodations renders superfluous the statute's use of the terms "goods," "services," "privileges," and "advantages," thereby violating a basic cannon of statutory construction. *See United States v. Alaska*, 117 S. Ct. 1888, 1918 (1997)(courts must avoid an interpretation that renders words in a statute redundant or superfluous). The

First Circuit's decision in *Carparts* properly interpreted, and applied, Title III.

In *Carparts*, a plaintiff challenged the lifetime benefit limitation in a health plan which applied to AIDS-related illnesses only. The defendants argued that Title III related only to physical access to public accommodations and did not prohibit disability-based insurance plans. After performing an exhaustive analysis of the statute, the legislative history, the ADA's plain language, and last, but not least, applying logic, the First Circuit determined that "[i]t would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result". *Id.* at 19. The court explained as follows:

> The plain meaning of the terms do not require 'public accommodations' to have physical structures for persons to enter. Even if the meaning of 'public accommodation' is not plain it is, at worst, ambiguous. This ambiguity, considered together with agency regulations and public policy concerns, persuades us that the phrase is not limited to actual physical structures.

Id.

Thus, the First Circuit concluded in *Carparts* that the district court erred in finding that neither the employment nor the public accommodations provisions of the ADA applied to the defendants [administrators/operators of the benefit plan at issue], and in dismissing plaintiff's ADA claims:

> Neither Title III nor its implementing regulations make any mention of physical boundaries or physical entry. Many goods and services are sold over the telephone or by mail with customers never physically entering the premises of a commercial entity to purchase the goods or services. **To exclude this broad category of businesses from the reach of Title III and limit the application of Title III to physical structures which persons must enter to obtain goods and services would run afoul of the purposes of the ADA and would severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages available indiscriminately to other members of the general public.**

Id. at 20. [Emphasis Added]. *See also Kotev v. First Colony Life Ins. Co.*, 927 F. Supp. 1316 (C.D. Cal. 1996)(holding that Title III protections clearly extend beyond denial of physical access); *Baker v. Hartford Life Ins. Co.*, 1995 WL 573430 (N.D. Ill. Sept. 28, 1995)(holding that the ADA does not require a plaintiff to be physically present at the place of public accommodation to be entitled to non-discriminatory treatment). As aptly stated in *Doukas v. Metropolitan Life Ins. Co.*, 950 F. Supp. 422 (D.N.H. 1996), "[t]here can hardly be a 'good' or 'service' more central to the day-to-day life of a seriously disabled person than insurance--for it is often insurance coverage that will determine a disabled person's ability to prevent the disability from limiting his or her participation in society." *Id.* at 427.

The court below reviewed the provisions of 42 U.S.C. § 12181(7) and acknowledged that an "insurance office" is a "public accommodation" (App., *infra*, 25a); however, since "Ford received her disability benefits via her employer at Schering, she had no nexus to MetLife's 'insurance office' and thus was not discriminated against in connection with a public accommodation." (App., *infra*, 26a). Through such reasoning, the Third Circuit concluded that Petitioner's long-term disability benefits were not covered by Title III of the ADA because they were provided through her employer, Schering-Plough, and administered by an insurance company, MetLife, in a way that did not involve the use of a physical place (*i.e.*, an insurance office). (App., *infra*, *id.*). By following this strained construction of Title III, the court below concluded that Petitioner's disability benefits also did not fall within the statute because "[t]he plain meaning of Title III is that a public accommodation is a place . . . ." (App., *infra*, 26a).

By denying Petitioner relief under the statute, the Third Circuit simply chose not to follow the well settled principle that remedial statutes, such as the ADA, are to be interpreted broadly to effectuate their intent. *See, e.g., Jefferson County Pharmaceutical Assn v. Abbott Labs.*, 460 U.S. 150, 159 (1983); *Gomez v. Toledo*, 446 U.S. 635, 639 (1980). This Court should grant Petitioner's petition to correct the Third Circuit's erroneous construction of Title III of the ADA.

B. The Third Circuit's Narrow Interpretation of Title III to Exclude the Terms and Conditions of Disability Benefits Provided by A Public Accommodation (*i.e.*, an insurance office) is Contrary to the First Circuit's Decision in *Carparts*, and the Department of Justice's Interpretation of Title III.

The Third Circuit held that Title III did not reach the disability benefits offered by the insurance office public accommodation, reasoning that "'[i]t is all of the services which the public accommodation offers, not all services which the lessor of the public accommodation offers[,] which fall within the scope of Title III.'" (App., *infra*, 26a) (quoting *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1015 (6th Cir. 1997) (*en banc*) (quoting, in turn, *Stoutenborough v. National Football League, Inc.*, 59 F.3d 580, 583 (6th Cir. 1995)). The *Stoutenborough* decision quoted by the *Parker en banc* majority involved a hearing impaired plaintiff's complaint that the National Football League's "blackout rule" denied hearing impaired people equal access to football games that would otherwise be available through local live telecasts. The Sixth Circuit in *Stoutenborough* ruled that the broadcasts did not involve a place of public accommodation. 59 F.3d at 582-83.

In *Parker*, however, the author of *Stoutenborough*, Judge Boyce Martin, dissented from the *en banc* majority on the grounds that the *Parker* majority incorrectly applied *Stoutenborough* because *Parker* involved goods or services (*i.e.*, insurance benefits) available through one of the places of public accommodation specifically listed in the statute. *See Parker*, 121 F.3d at 1019. The Third Circuit's decision that Title III does not reach the terms and conditions of disability

benefits offered by a specifically listed public accommodation, which relies on *Parker's* misapplication of *Stoutenborough*, directly conflicts with the interpretation given to Title III on this issue by courts following the reasoning of *Carparts*, and also by the Department of Justice (the latter of these two divergences will be discussed *infra*).

In *Carparts*, the First Circuit addressed the goods and services issue under Title III as follows:

> By including "travel service" among the list of services considered 'public accommodations,' Congress clearly contemplated that 'service establishments' include providers of services which do not require a person to physically enter an actual physical structure.

37 F.3d at 19.

By so reasoning, *Carparts* did not preclude regulation of the terms and conditions of insurance products under Title III, a conclusion supported by the decision in *Doukas v. Metropolitan Life Ins. Co.*, 950 F. Supp. 422, 426 (D.N.H. 1996) that, pursuant to *Carparts*, the expansive provisions of Title III "are a strong indication that Title III was intended to extend beyond mere access or availability of a good or service." *Id.* This point was articulated further in a recent, well-reasoned opinion by the District Court for the Northern District of California as follows:

> Nothing within the plain language of the statute lends itself to such a narrow reading. The statute's general prohibitions ban the discriminatory "denial of the opportunity . . . to participate in or benefit from the goods, services,

> facilities, privileges, advantages, or accommodations of an entity." 42 U.S.C. § 12182(b)(1)(A)(i). . . . Interpreting Title III to prohibit only physical barriers to the access of "facilities" would dispense with the language mandating equal opportunity to "participate in or benefit from" the "goods," "services," "privileges," and "advantages" of a commercial transaction. Equally telling, Title III's specific prohibitions against discriminatory "application of eligibility criteria," "failure to make reasonable modifications in policies, practices, or procedures, "and" failure to take such steps . . . to ensure that no individual with a disability is excluded, denied services, or otherwise treated differently," could easily apply to the case of an insurer's rejection of a prospective customer without any physical barriers to access. 42 U.S.C. § 12182(b)(2)(A)(i-iii).

Cloutier v. Prudential Ins. Co. of Am., 964 F. Supp. 299, 302 (N.D. Cal. 1997).

Cloutier's reasoning is consistent with the First Circuit's thoughtful analysis in *Carparts* that the inclusion of a "travel service" among the statutorily listed examples of a "public accommodation" shows that Congress intended for such to "include providers of services which do not require a person to physically enter an actual physical structure." *Carparts*, 37 F.3d at 19.

Further support for Congress' intent to cover the terms and conditions of disability insurance under the ADA is found in Title V of the Act, specifically entitled "Insurance," which provides a "safe harbor" for certain insurance

practices that would otherwise violate the ADA with the following pertinent language:

> Subchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict –
>
> (1) an insurer . . . or any agent, or entity that administers benefit plans . . . from un derwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law.

42 U.S.C. § 12201(c).[1] A reasonable inference to be drawn from this language is that Congress intended for the contents of insurance products to be subject to Titles I through III of the ADA, otherwise there would have been no need to expressly exempt through a "safe harbor" those insurance practices that may be discriminatory under Title III. *See Kotev v. First Colony Life Ins. Co.*, 927 F. Supp. 1316, 1321 (C.D. Cal. 1996).

By aligning itself on the Title III issue with the Sixth Circuit's *en banc* majority in *Parker*, the Third Circuit acknowledged that it was "part[ing] company with the First

1 The Third Circuit concluded that it was bound by the McCarran-Ferguson Act to affirm the dismissal of Petitioner's ADA claim. (App., *infra*, 24a). According to that Act, "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance . . . ." 15 U.S.C. § 1012(b). On a perceived basis that the ADA "does not 'specifically relate to the business of insurance,'" (App., *infra*, 24a), the Third Circuit concluded that Petitioner could not state her claim under the ADA. This conclusion is puzzling, however, in light of the title of ADA Title V – "Insurance." 42 U.S.C.§ 12201(c).

Circuit" holding in *Carparts* "that Title III is not limited to physical structures . . . [through its] inclusion of `travel service' in the list of public accommodations . . . ." (App., *infra*, 28a). However, the First Circuit is not the only court to analyze the applicability of the ADA to discrimination in the provision and coverage of insurance. *See, e.g., Chabner v. United Omaha Life Ins. Co.*, 994 F. Supp. 1185 (N.D. Cal. 1998); *Lewis v. Aetna Life Ins. Co.*, 982 F. Supp. 1158, 1163-65 (E.D. Va. 1997); *Attar v. Unum Life Ins. Co.*, 1997 WL 446439 at *11-12 (N.D. Tex. 1997); *World Ins. Co. v. Branch*, 966 F. Supp. 1203, 1207 (N.D. Ga. 1997); *Cloutier v. Prudential Ins. Co. of Am.*, 964 F. Supp. 299, 301-02 (N.D. Cal. 1997); *Doukas v. Metropolitan Life Ins. Co.*, 950 F. Supp. 422, 425-27 (D.N.H. 1996); *Kotev v. First Colony Life Ins. Co.*, 927 F. Supp. 1316, 1321-23 (C.D. Cal. 1996); *Anderson v. Gus Mayer Boston Store*, 924 F. Supp. 763 (E.D. Tex. 1996); *Piquard v. City of East Peoria*, 887 F. Supp. 1106 (C.D. Ill. 1995); and *Baker v. Hartford Life Ins. Co.*, 1995 WL 573430 (N.D. Ill. 1995). Each of these cases held that Title III reaches disability-based discrimination in the terms and conditions of insurance products, including those provided through employer-sponsored group benefits plans (*i.e., Anderson and Piquard*). In addition to these district court holdings is the position consistently taken on this issue by the Department of Justice.

As the agency authorized by Congress to interpret Title III, the Department of Justice has concluded that insurance offices, as a place of "public accommodation," "may not discriminate on the basis of disability in the . . . terms or conditions of the insurance contracts they offer." *See* Dept. of Justice, *Title III Technical Assistance Manual: Covering Public Accommodations and Commercial Facilities*, § III-3.11000, at 19 (Nov. 1993). The Department of Justice's regulations and interpretive guidance pertaining to the Title III issues must

be given "legislative, and hence controlling, weight unless they are arbitrary, capricious or clearly contrary to the statute." *See, e.g., United States v. Morton*, 467 U.S. 822, 834 (1984). Indeed, the Technical Assistance Manual is entitled to substantial deference. *See, e.g., Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 45 n.8 (2d Cir. 1997). Without any discussion as to how it arrived at its conclusion, the Third Circuit concluded that the Department of Justice's position that the terms and conditions of insurance products are governed by Title III was "'manifestly contrary' to the plain meaning of Title III." (App., *infra*, 28a). This Court should exercise its supervisory authority and grant the writ sought by Petitioner in this case to rectify the Third Circuit's failure to give due deference to the Department of Justice's regulations and interpretation of Title III.

In summary, the Third Circuit's decision eviscerates the heart of Title III of the ADA, effectively insulates insurers' discriminatory practices from the reach of this statute, and stands in stark contrast to the just approach of the First Circuit and subsequent courts embracing its reasoning. Due to the split between the First and Third Circuits (as well as the First and Sixth Circuits on this issue), this Court is presented with the opportunity to address these ADA issues in order to settle the law in this area, and serve the manner with which justice will be administered in future ADA cases raising these issues.

II. The Third Circuit's Holding That the ADA is Not Violated By Disparities in Benefits Between Mentally and Physically Disabled Individuals Insured Under the Same Plan, Which is Plainly a Disability-Based Distinction, is Contrary to the ADA's Express Purpose Prohibiting Such Distinctions From Being Made.

As indicated above, the Third Circuit held that distinguishing between individuals with different disabilities for insurance purposes is not, as a matter of law, discrimination based on disability. (App., *infra*, 15a). In particular, the court held that although the benefits plan "differentiated between types of disabilities, ... [e]very Schering employee had the opportunity to join the same plan with the same schedule of coverage, meaning that every Schering employee received equal treatment." (App., *infra*, *id.*). The court added that "[s]o long as every employee is offered the same plan regardless of that employee's contemporary or future disability status, then no discrimination has occurred even if the plan offers different coverage for various disabilities." (App., *infra*, *id.*).

What this reasoning and conclusion ignores, however, is the simple fact that mentally disabled employees were singled out **as a group** under the plan to receive less favorable disability benefits than physically disabled employees. Such a distinction is clearly **based upon** disability and, as a result, violates the ADA's prohibition against **disability-based** distinctions. This conclusion finds further support in Judge Alito's concurrence below that "it would seem that [distinguishing between people with different disabilities for insurance purposes] does constitute discrimination in the most basic sense of the word." (App., *infra*, 34a)(quoting

Webster's Third New International Dictionary, at 648, for the definition of "discrimination").

Congress enacted the ADA in 1990 as a sweeping mandate to end discrimination against individuals with disabilities. Among other reasons, the stated purpose of the statute is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities [by] invok[ing] the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(1),(4). As it relates to a disparity in disability insurance benefits, the ADA provides in relevant part as follows:

> It shall be discriminatory to subject an individual or **class of individuals** on the basis of a disability or disabilities of such individual or class, directly, **or through contractual**, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

42 U.S.C. § 12182(b)(1)(A)(i) (emphasis added).

In order to realize its purpose, the ADA prohibits a covered entity from discriminating against a qualified individual with a disability "because of the disability of such individual." 42 U.S.C. § 12112(a). On its face, that provision prohibits a covered entity from taking disability "into account" in granting or denying disability benefits. *Cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 239-45

(1989) (reasoning that "because of" language in Title VII prohibits an employer from taking race or gender "into account"). However, that is precisely what the long-term disability benefits plan does in this case – it makes a disability benefits decision (*i.e.*, the amount of long-term disability benefits) after taking different disabilities (mental and physical) "into account." By treating mentally disabled individuals less favorably than those with physical disabilities for insurance coverage purposes, and by arbitrarily drawing a distinction between these two groups that restricts long-term disability coverage for the mentally disabled as compared with the full benefits offered to physically disabled individuals under the same insurance plan, the Schering-sponsored, and MetLife-issued, insurance plan violated the ADA by discriminating against Ford **based solely upon her disability**. By holding that such long-term disability-based distinctions do not violate the ADA, the Third Circuit ignored this statutory scheme and misapplied the statute.

When drafting the ADA, Congress was apparently aware that many health insurance plans provide different levels of coverage for treating mental conditions. In fact, it believed that it would be "permissible for an employer to offer insurance policies that limit coverage for certain procedures or treatments, *e.g.*, only a specified amount per year for mental health coverage." S. Rep. No. 116, 101st Cong., 1st Sess. at 29. This same Report made clear, however, that Congress disapproved of any covered entity singling out those with mental conditions for less coverage on subjects unrelated to treating the mental condition. *Id.* Therefore, if a covered entity cannot single out individuals with mental conditions for lesser treatment under a health plan for concerns unrelated to treating the mental condition, then it also should not be able to single out individuals with these conditions for

lesser benefits under the terms of a long-term disability insurance plan.

Although the Third Circuit perceived the issue in this case to be whether or not an insurance plan that differentiated between types of disabilities was equally available to all Schering employees, (*See* App., *infra*, 15a), this case actually involves "a specific disabled employee facing differential treatment due to her disability." (App., *infra*, *id.*). The court's conclusion that this plan was equally available to all Schering-Plough employees was rendered without consideration of the fact that qualified individuals with mental/nervous disabilities were prevented from receiving the **full** benefits afforded to individuals suffering from other disabilities. This result is analogous to the clearly insupportable proposition that an insurance plan which permits all races to **participate** is nondiscriminatory, even though one race is entitled to receive benefits for only two years, while another race receives benefits until age 65.

In arriving at its conclusion that the ADA permits disability-based distinctions in long-term benefits, the Third Circuit relied upon cases decided under the Rehabilitation Act such as *Traynor v. Turnage*, 485 U.S. 535 (1988) and *Alexander v. Choate*, 469 U.S. 287 (1985). In *Traynor*, this Court held that the specific benefit distinction at issue in that case did not violate the Rehabilitation Act. 485 U.S. at 550. The **Traynor** Court did, however, suggest that it would be impermissible for an entity to "distinguish between categories of disabled [individuals] accord[ing] to generalized determinations that lack any substantial basis." *Id.*

The Third Circuit's application of the more limited content of the Rehabilitation Act to the broader social mandate and comprehensive scheme of the ADA in this case was

in error. Although the ADA draws upon Rehabilitation Act standards, there are substantive distinctions between the two which warrant an interpretation of the ADA that is consistent with its legislative intent, and not a distinct statute such as the Rehabilitation Act. The Rehabilitation Act, for example, imposes restrictions on the disbursement of benefits under government programs. Consequently, that Act is primarily concerned with assuring that "handicapped" individuals receive "evenhanded treatment" in relation to "nonhandicapped" individuals. *See Alexander v. Choate*, 469 U.S. 287, 304 (1985).

In contrast, the ADA specifically prohibits discrimination based on disability, making it illegal for a covered entity to discriminate against a qualified individual, or class of individuals, with a disability "because of the disability of such individual." 42 U.S.C. § 12112(a). This language does not derive from the Rehabilitation Act, but Title VII. *See* 42 U.S.C. § 2000e-2(a)(1). The court below, as well as the Sixth Circuit's *en banc* majority in *Parker*, relied upon the Rehabilitation Act in construing the remedial, and broader, ADA provisions. In fact, this Court recently concluded in an ADA case that it was required under the statute "to construe the ADA to grant **at least as much protection** as provided by the regulations implementing the Rehabilitation Act." *Bragdon v. Abbott*, 118 S. Ct. 2196, 2202 (1998) (emphasis added). This Court should grant the writ sought by Petitioner to correct the errors of these circuit courts, and to clarify the substantive distinctions between the ADA and Rehabilitation Act.

In addition to applying Rehabilitation Act standards to this ADA case, the court below also relied upon two cases from sister circuits in holding that disparate benefit limitations are permissible, *Krauel v. Iowa Methodist Med. Ctr.*, 95

F.3d 674 (8th Cir. 1996), and *EEOC v. CNA Ins. Co.*, 96 F.3d 1039 (7th Cir. 1996). Neither of these cases address this issue, however.

Krauel held that an employer did not violate Title I of the ADA where its health insurance plan did not pay for infertility treatment. The Eighth Circuit affirmed the District Court's holding that infertility was not an ADA-covered disability. Therefore, the distinction was not disability-based because it applied both to individuals with and without disabilities. *Krauel*, 95 F.3d at 677. Conversely, in the case at bar, plaintiff's claim is based upon a disability clearly covered by the ADA. *See* 42 U.S.C. § 12102(2). She was the subject of a discriminatory distinction in her insurance benefits **solely** because of her protected mental disability. Thus, the *Krauel* analysis is inapposite.

CNA is similarly inapplicable to the instant matter in that the Seventh Circuit's analysis relies upon the now discredited Fourth Circuit and Western District of Tennessee opinions in *Robinson v. Shell Oil Co.*, 70 F.3d 325 (4th Cir. 1995)(en banc), and *Parker v. Metropolitan Life Ins. Co.*, 875 F. Supp. 1321 (W.D. Tenn. 1995). The Seventh Circuit's *CNA* analysis, and decision that a current "employment position" was a prerequisite to have standing under the ADA, also predates this Court's decision in *Robinson v. Shell Oil Co.*, 117 S. Ct. 843 (1997), and the Third Circuit's decision in this case that a current "employment position" is not a requirement to assert standing under the ADA. *CNA* is therefore of questionable, if any, authoritative value to an analysis of the disparate benefits issue.

This Court should therefore exercise its supervisory authority and grant this petition in order to correct the erroneous Third (and Sixth) Circuit conclusion that a disability-

based disparity in insurance benefits does not violate the ADA.

III. The Third Circuit's Decision That Title V of the ADA Does Not Require a Disability Insurer to Justify its Disability-Based Distinction in Insurance Benefits With Competent Evidence Contravenes the Legislative History, and Interpretive Case Law, Underlying the ADA Which Expressly Require This Evidential Support.

The Third Circuit took the remarkable position that the ADA "does not 'specifically relate[] to the business of insurance'". (App., *infra*, 24a). This conclusion not only contradicts the express language of § 12201 of the ADA, but renders superfluous Title V of that statute.

Title V of the ADA ensures that, just as with any other "fringe benefit" or provision of "services," so too must an insurance "benefit" comply with the ADA. The wealth of emerging considered authority on point recognizes that Title V mandates a judgment in favor of Petitioner, unless the Respondents can show that facially discriminatory provisions, as here, fall within the narrow "safe harbor" articulated in the statute.

Section 12201(c) of Title V, known as the "safe harbor" provision, states that insurance distinctions based upon legitimate underwriting risks, not inconsistent with state law, are not prohibited. This provision was intended to emphasize that "insurers may continue to sell to and underwrite individuals applying for life, health or other insurance on an individually underwritten basis, or to service such insurance products, so long as the standards used are based on sound

actuarial data and not on speculations". *Kotev v. First Colony Life Insurance Company*, 927 F.Supp. 1316 (C.D. Cal. 1996) (*citing* Judiciary Report at 137, Senate Report at 85; Education and Labor Report at 137, Preamble to Regulations on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 28 C.F.R. Part 36, App. B. at 612). However, this Title also goes on to state that the "safe harbor" provision "shall not be used as a subterfuge to evade the purposes of subchapter[s] I and III of this Chapter." 42 U.S.C. § 12201(c).

Thus, by affording Respondents with some legitimate defenses to an ADA claim, Title V makes it abundantly clear that insurance plans are subject to the ADA and that, absent competent evidence supporting any disability-based distinctions, any such distinctions made in benefit plans will violate the ADA. This conclusion is supported by both the ADA's legislative history, and cases that have applied and interpreted it. For instance, in *Kotev* the court conducted a thorough review of the ADA's legislative history, regulations and comments and concluded that a plaintiff is entitled to bring a claim under Title III for the discriminatory denial of insurance coverage. The *Kotev* Court explained as follows:

> The regulations implementing Title III also demonstrate that Title III governs the issuance of insurance policies. 12 C.F.R. § 36.212 provides a safe harbor to insurers, similar to 42 U.S.C. § 12201(c), who "underwrite[e] risks, classify[ ] risks, or administer[ ] such risks that are based on or not inconsistent with state law." The preamble to the Title III regulations emphasizes that insurance companies are public accommodations and that the practices of the insurance industry are covered by

Title III. With regard to § 36.212, the preamble states:

> Language in the committee reports indicates that Congress intended to reach insurance practices by prohibiting differential treatment of individuals with disabilities in insurance offered by public accommodations unless the differences are justified. **"Under the ADA, a person with a disability cannot be denied insurance or be subject to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks.** (Senate Report at 84; Education and Labor report at 136), Section 501(c) of the Act was intended to emphasize that "insurers may continue to sell to and underwrite individuals applying for life, health or other insurance on an individually underwritten basis, or to service such insurance products, so long as the standards used are based on sound actuarial data and not on speculation" (Judiciary report at 70 (emphasis added); see also Senate report at 85; Education and Labor report at 137). Preamble to Regulation on Nondiscrimination on Basis of Disability by Public Accommodations and in Commercial Facilities, 28 C.F.R. Part 36, App. B at 612.

> The Department of Justice further notes that "life and health insurance are the areas where the regulation will have its greatest application." *Id.* at 613. This commentary is consistent with the legislative history of 42 U.S.C.§ 12201(c) which states: **"In sum, ADA requires that underwriting and classification of risks be based on sound actuarial principles or be related to actual or reasonable anticipated experience."** H.R.Rep. No. 485, 101st Cong., 2d Sess. at 71; S.Rep.No. 116, 101st Cong., 1st Sess. at 84-86. **The legislative history and the regulations and comments of the Justice Department support the Court's conclusion that Kotev is entitled to bring a claim under Title III for the discriminatory denial of insurance coverage.**

927 F. Supp. at 1323. [Emphasis Added].

Moreover, the *Kotev* court considered the "safe harbor" provision to impose a **duty** upon defendants to **justify** their insurance plan decisions on an actuarial or underwriting basis, to show that they comply with "state law", and to show that they are not a "subterfuge" for prohibited disability discrimination. As *Kotev* explained, the plain language of 501(c) itself cannot be read to exempt insurance companies from the prohibitions of the ADA, because that language provides that it "shall not be used **as a subterfuge** to evade the purposes of subchapter[s] I and III of this chapter." 42 U.S.C. § 12201(c) (emphasis added). A number of other courts have followed the sensibility of this supported logic: *Lewis v. Aetna Life Ins. Co.*, 982 F. Supp. 1158, 1168-69 (E.D. Va. 1997) (concluding that an insurer may not draw a distinction between mental and psychical disabilities absent

compliance with actuarial principles or other competent factual basis); *World Ins. Co. v. Branch*, 966 F. Supp. 1203, 1208 (N.D. Ga. 1997) (granting insured's counterclaim under the ADA to extend this principle to plan distinctions targeting particular disabilities); *Cloutier v. Prudential Ins. Co. of Am.*, 964 F. Supp. 299, 305-06 (N.D. Cal. 1997) (holding that "the evidence suggest[ed] that Prudential did not base its decision on sound actuarial data," and that the denial of plaintiff's application "may not have accorded with reasonably anticipated experience"); *Anderson v. Gus Mayer Boston Store of Delaware*, 924 F. Supp. 763, 778 (E.D. Tex. 1996) ("The ADA puts the burden on those actors classifying risks to show both their rationality and permissibility"); *Doukas v. Metropolitan Life Insurance Co.*, 950 F. Supp. 422 (D.N.H. 1996) (summary judgment on Title III claim denied due to lack of actuarial basis for insurer's denial of coverage for bipolar disorder); *Piquard v. City of East Peoria*, 887 F. Supp. 1106, 1125 (C.D. Ill. 1995) ("The EEOC's Interim Policy . . . explains that requiring the defendant to bear the burden of proof is consistent with the principle that the burden of proof should rest with the party who has the greatest access to the relevant facts); and *Baker v. Hartford Life Ins. Co.*, 1995 WL 573430, at *3-4 (N.D. Ill. 1995) (holding that the rule of construction contained in Section 12201(c)(1) of Title V placed the burden upon defendant to show that its decision to deny plaintiff coverage was: (1) based on considerations of underwriting or classifying risks; and (2) not a subterfuge for disability discrimination).

As the Court aptly noted in *Piquard v. City of East Peoria*, 887 F. Supp. 1106 (C.D. Ill. 1995), such blanket assumptions about particular disabilities are not legally justifiable without competent evidence:

Section 3 of the NAIC's [National Association of Insurance Commissioners] Model Regulation on Unfair Discrimination in Life and Health Insurance on the Basis of Physical or Mental Impairment prohibits:

> [R]efusing to insure, or refusing to continue to insure, or limiting the amount, extent or kind of coverage available to an individual, or charging a different rate for the same coverage **solely because of physical or mental impairment, except where the refusal, limitation or rate differential is based on sound actuarial principles or is related to actual or reasonably anticipated experience.** (Emphasis Added)

* * *

The House and Senate Reports further state that:

> [W]hile a plan which limits certain kinds of coverage based on classification of risk would be allowed under this section, the plan may not refuse to insure, or refuse to continue to insure, or limit the amount, extent, or kind of coverage available to an individual, or charge a different rate for the same coverage **solely because of a physical or mental impairment,** except where the refusal, limitation, or rate differential is based on sound actuarial principles or is related to actual or reasonably anticipated experience.

Id. at 1110.

Despite this evidentiary requirement of Title V, the Third Circuit concluded that an insurer is never required "to justify its policy coverage after a plaintiff's mere **prima facie** allegation" of discrimination between disabilities. (App., *infra*, 23a-24a). However, Petitioner did not "merely allege" discrimination; the disability plan at issue here discriminated, **on its face**, among disabilities. Respondents could have, but did not, attempt to show on their 12(b)(6) motion that such discrimination was justified by actuarial data, rather than the very stereotypes about mental disabilities which the ADA was designed to eradicate. Petitioner asked merely for the opportunity to require defendants to do so on remand, as the ADA and the cases interpreting it require.

In holding that insurers are **never** subject to the ADA unless they deliberately violate it, the Third Circuit relied upon this Court's construction of the "subterfuge" provision in *Public Employees Retirement Sys. of Ohio v. Betts*, 492 U.S. 158 (1989). (App., *infra*, 22a-24a). *Betts* analyzed provisions in a state retirement plan that was challenged as a discriminatory subterfuge pursuant to the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 ("ADEA"). In its analysis, the Court defined subterfuge under the ADEA to require a "scheme, plan, stratagem, or artifice of evasion" used to discriminate "in some **non-fringe benefit** aspect of the employment relationship." *Betts*, 492 U.S. at 181 (emphasis added). The *Betts* Court ultimately held that the scrutinized provisions did not constitute an ADEA subterfuge **solely** because the retirement plan was enacted prior to the enactment of the ADEA. *Id.* at 167.

In contrast, the ADA expressly provides that an employer may not discriminate with respect to the "fringe

benefits" of employment, including contracting with an organization providing such benefits in a discriminatory manner. 42 U.S.C. § 12112(b)(2). On this basis, the EEOC's Interim Guidance specifically provides that the *Betts* rationale **does not apply** to Title I cases because, unlike the ADEA, Title I prohibits such "fringe benefit" discrimination. EEOC Interim Guidance, Daily Lab. Rep. (BNA) No. 109 at E-2. Moreover, the burden of proving that a plan is not a subterfuge is on defendants. *Id.* at E-3. The EEOC's reasonable interpretation of the "subterfuge" issue as it relates to the ADA is entitled to deference, as this Court has previously concluded that "the EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference." *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 115 (1988).

Of significance is the further issue that the long-term disabilities plan adopted by MetLife prior to the ADA's enactment, which made a disability-based distinction adversely affecting mentally disabled individuals, has not been brought into compliance with the ADA. Judge Alito raised this issue in a footnote to his concurrence below as follows:

> Three justices in *[United Air Lines, Inc v.]McMann* rejected the majority's conclusion that a plan adopted prior to the enactment of the ADEA could not be a subterfuge to avoid the purposes of that Act. *See* 434 U.S. at 204-05 (White, J., concurring); *id.* at 219 n.13 (Marshall, J., joined by Brennan, J., dissenting). According to these justices, a pre-Act plan could become a subterfuge if it was maintained after the passage of the ADEA in order to evade the purposes of that Act. One could argue that this position is stronger under the

> ADA's "safe harbor" provision due to difference [sic] in the statutory language. *Compare* 29 U.S.C. § 623(f) ("*is not* a subterfuge to evade the purposes of" the ADEA) (emphasis added) *with* 42 U.S.C. § 1201(c) [sic] ("*shall not be used* as a subterfuge to evade the purposes of" the ADA)(emphasis added). However, I do not believe that this change is sufficient to avoid the mandate of *McMann* and *Betts*.

(App., *infra*, 35a-36a). The import of Judge Alito's observation on this issue should not be overlooked, and, by virtue of this Court's supervisory authority, Ford's petition should be granted in order to clarify that a "subterfuge" under the ADA is not that which was addressed in *Betts*, and that all insurance plans, whether effective before or after the ADA, must nevertheless comply with that Act.

Conclusion

Petitioner respectfully requests that this Court grant her petition for a Writ of Certiorari.

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Filed May 22, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-5674

COLLEEN V. FORD,
Appellant

v.

SCHERING-PLOUGH CORPORATION;
SCHERING CORPORATION;
METROPOLITAN LIFE INSURANCE COMPANY

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 96-cv-01991)

Argued January 28, 1998

BEFORE: MANSMANN, COWEN and ALITO, Circuit Judges

(Filed May 22, 1998)

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OPINION OF THE COURT

COWEN, Circuit Judge.

This appeal presents the purely legal question of whether a disparity between disability benefits for mental and physical disabilities violates the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq. (1994). The plaintiff-appellant, Colleen Ford, sued her employer, Schering-Plough Corporation (Schering), and the carrier of Schering's group insurance policy, Metropolitan Life Insurance Company (MetLife), alleging that the two-year cap applicable to benefits for mental disabilities, but not for physical disabilities, violates the ADA. On September 12, 1996, the District Court for the District of New Jersey granted the defendants' motion to dismiss Ford's complaint under Federal Rule of Civil Procedure 12(b)(6). Ford appealed. We will affirm the order of the district court dismissing Ford's complaint even though we differ with the district court by finding Ford eligible to file suit under Title I of the ADA.

I.

The facts concerning the plaintiff's employment and her disability are not in dispute. Ford was an employee of Schering from 1975 until May of 1992, when she became disabled by virtue of a mental disorder and was unable to

continue her employment. While she served as an employee, Ford enrolled in the employee welfare benefits plan offered by Schering through MetLife. The plan provided that benefits for physical disabilities would continue until the disabled employee reached age sixty-five so long as the physical disability persisted. Regarding mental disabilities, however, the plan mandated that benefits cease after two years if the disabled employee was not hospitalized. Ford found herself in this latter category, suffering from a mental disorder yet not hospitalized and thus ineligible for a continuation of her benefits past the two-year limit. Her benefits expired on Nov. 23, 1994.

Ford filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). The EEOC issued her a "right-to-sue" letter on January 31, 1996. Subsequently, Ford filed a three-count complaint against Schering and MetLife alleging discrimination in violation of the ADA. The defendants filed motions to dismiss the complaint pursuant to Rule 12(b)(6) and, in the alternative, for summary judgment. The district court granted the defendants' Rule 12(b)(6) motion, dismissing the complaint for failure to state a claim. This appeal followed.

II.

We have jurisdiction under 28 U.S.C. § 1291 (1994), and our review over the district court's order is plenary. When considering a Rule 12(b)(6) motion, we accept as true all the allegations set forth in the complaint, and we must draw all reasonable inferences in the plaintiff's favor. See Schrob v. Catterson, 948 F.2d 1402, 1405 (3d Cir. 1991). Dismissal of a plaintiff's claim under Rule 12(b)(6) occurs only if the plaintiff "can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355

U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957).

III.

Because the facts of this case are not in dispute, our analysis focuses on the legal question of whether the disparity between mental and physical disability benefits violates the ADA and, as a preliminary issue, whether Ford is even eligible to sue under the ADA. We will address Ford's claims under Titles I and III seriatim.

A.

Ford's first claim alleges that the defendants' group insurance plan violates Title I of the ADA because of the disparity in benefits between mental and physical disabilities. Title I of the ADA proscribes discrimination in the terms and conditions of employment and mandates in relevant part:

> (a) General rule
>
> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.
>
> (b) Construction
>
> As used in subsection (a) of this section, the term "discriminate" includes--
>
> . . . .

> (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with . . . an organization providing fringe benefits to an employee of the covered entity[)] . . . .

42 U.S.C. § 12112(a)-(b) (emphasis added). As the plaintiff correctly observes, the defendants' group insurance plan is a fringe benefit of employment at Schering. Ford claims that the defendants violated Title I of the ADA because the mental-physical disparity constitutes discrimination against her on the basis of her disability.

i.

Before addressing the merits of Ford's Title I claim, we must first ascertain whether Ford is eligible tofile suit under Title I. While the district court held that Ford lacked "standing[,]" Dist. Ct. Op. at 7, the question of standing is not at issue in this case. Indeed, Ford has been"injured in fact" by the denial of her benefits, which is"an injury to [herself] that is likely to be redressed by a favorable decision." Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38, 96 S. Ct. 1917, 1924 (1976). Furthermore, Ford's interest is arguably within the zone of interests regulated by the ADA. See id. at 39 n.19, 96 S. Ct. at 1925 n.19. Instead of ascertaining Ford's standing, we must assess Ford's eligibility under the ADA's requirements to file suit.

Title I of the ADA restricts the ability to sue under its provisions to a "qualified individual with a disability[,]"

whose characteristics are defined as follows:

> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

42 U.S.C. § 12111(8). Thus, an individual eligible to sue under Title I of the ADA must be disabled but still able to perform his or her job duties with or without a reasonable accommodation by the employer. Ford, however, admits that she is currently unable to work even with a reasonable accommodation. Indeed, her disabled status is the reason for her desire to receive the disability benefits at issue here.

The defendants-appellees argue that Ford is clearly ineligible to sue under Title I of the ADA because she is currently disabled, and they point to our recent statement that "a person unable to work is not intended to be, and is not, covered by the ADA." McNemar v. Disney Store, Inc., 91 F.3d 610, 618 (3d Cir. 1996), cert. denied, ___ U.S. ___, 117 S. Ct. 958 (1997). McNemar focused on whether an individual is judicially estopped from claiming to be a "qualified individual with a disability" when he represented to governmental agencies that he was completely disabled. In McNemar, an HIV-positive man represented to government agencies that he was completely disabled for the purpose of receiving disability benefits. At the same

time, he asserted that he was a "qualified individual with a disability[,]" meaning that he could work with or without a reasonable accommodation, in his suit against his former employer under the ADA for wrongful discharge. As a result, we concluded that the district court was within its discretion in finding that McNemar's representations to government agencies estopped him from claiming that he was a "qualified individual with a disability" under Title I. See id. at 617-18.

At first glance, McNemar seems to cover the instant case since Ford has asserted she is completely disabled for purposes of disability benefits yet is now asserting she is a "qualified individual with a disability" for purposes of her ADA suit. However, despite its apparent relevance, McNemar is distinguishable. In McNemar, the plaintiff's situation vis-a-vis the ADA did not give rise to the possibility that, for reasons intrinsic to the ADA, there was an ambiguity in the definition of "qualified individual with a disability[.]" The essence of McNemar's suit was that he could still work despite his disability (meaning that he was wrongfully discharged), yet he simultaneously received benefits for being unable to work due to his disability. McNemar's situation did not unearth an internal contradiction in the ADA; instead, the contradiction in McNemar's position arose between McNemar's various representations, namely his claim of wrongful discharge and his assertion to government agencies that he was completely disabled.

In the instant case, Ford is also attempting to qualify under Title I's eligibility requirement, but the factual predicate of her claim (that she is disabled and deserving of disability benefits) matches the representation she made to qualify for the benefits she already received. Unlike the

McNemar plaintiff, Ford illuminates an internal contradiction in the ADA itself, namely the disjunction between the ADA's definition of "qualified individual with a disability" and the rights that the ADA confers. Title I of the ADA prohibits discrimination by employers regarding the "terms, conditions, and privileges" of employment, 42 U.S.C. § 12112(a), including "fringe benefits" such as disability benefits. Id. § 12112(b)(2). Yet, as Ford and the EEOC as amicus argue, restricting eligibility to sue under Title I to individuals who can currently work with or without a reasonable accommodation prevents disabled former employees from suing regarding discrimination in disability benefits. Once an individual becomes disabled and thus eligible for disability benefits, that individual loses the ability to sue under a strict reading of Title I's definition of "qualified individual with a disability" because that individual can no longer work with or without a reasonable accommodation. In order for the rights guaranteed by Title I to be fully effectuated, the definition of "qualified individual with a disability" would have to permit suits under Title I by more than just individuals who are currently able to work with or without reasonable accommodations.

This disjunction between the explicit rights created by Title I of the ADA and the ostensible eligibility standards for filing suit under Title I causes us to view the contents of those requirements as ambiguous rather than as having an unassailable plain meaning. "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." Robinson v. Shell Oil Co., ___ U.S. ___, ___, 117 S. Ct. 843, 846 (1997) (citing Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 477, 112 S. Ct. 2589, 2594-95 (1992), and

McCarthy v. Bronson, 500 U.S. 136, 139, 111 S. Ct. 1737, 1740 (1991)). The locus of the ambiguity is whether the ADA contains a temporal qualifier of the term "qualified individual with a disability[.]" If the putative plaintiff must, at the time of the suit, be employable with or without a reasonable accommodation, then a disabled former employee loses his ability to sue to challenge discriminatory disability benefits. Alternatively, the term "qualified individual with a disability" may include former employees who were once employed with or without reasonable accommodations yet who, at the time of suit, are completely disabled.

The Supreme Court's recent decision in Robinson, which concerned the scope of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1994), contributes to this ambiguity by lending support for interpreting Title I of the ADA to permit suits by disabled individuals against their former employers concerning their disability benefits. Cases interpreting Title VII are relevant to our analysis of the ADA because the ADA is essentially a sibling statute of Title VII. Indeed, the ADA's accompanying House report states that the purpose of the ADA is "to provide civil rights protections for persons with disabilities that are parallel to those available to minorities and women." H.R. Rep. No. 101-485, pt. 3, at 48 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 471. Furthermore, the ADA incorporates by reference several terms defined in Title VII. See 42 U.S.C. § 12111(7) (incorporating Title VII's definitions of "person", "labor organization", etc.).

In Robinson, the Supreme Court analyzed whether former employees are allowed to bring suits against their previous employers under Title VII for post-termination retaliation such as negative job references. The Court found that the

term "employees" as used in § 704(a) of Title VII was ambiguous regarding its temporal reach, i.e., whether it covered only current employees or encompassed former employees as well. See ___ U.S. at ___, 117 S. Ct. at 846-48. Resolving this ambiguity, the Court held that the term encompassed former employees in order to provide former employees with a legal recourse against post-termination retaliation. See id. at ___, 117 S. Ct. at 848-49; see also Charlton v. Paramus Bd. of Educ., 25 F.3d 194, 200 (3d Cir. 1994) (former employee may file a retaliation claim against a former employer under Title VII).

As with the term "employees" in Title VII, the ADA contains an ambiguity concerning the definition of "qualified individual with a disability" because there is no temporal qualifier for that definition. Congress could have restricted the eligibility for plaintiffs under the ADA to current employees or could have explicitly broadened the eligibility to include former employees. Since Congress did neither but still created rights regarding disability benefits, we are left with an ambiguity in the text of the statute regarding eligibility to sue under Title I.

We resolve this ambiguity by interpreting Title I of the ADA to allow disabled former employees to sue their former employers regarding their disability benefits so as to effectuate the full panoply of rights guaranteed by the ADA. This is in keeping with the ADA's rationale, namely "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities . . . [and] to provide clear, strong, consistent, enforceable standards addressing [such] discrimination . . . ." 42 U.S.C.§ 12101(b)(1)-(2) (emphasis added). Our decision is also in keeping with the Supreme Court's Robinson decision, which found that the temporal reach of

Title VII encompasses former employees, and our pre-Robinson decision to that effect in Charlton, 25 F.3d at 200.

By adopting this interpretation, we part ways with the Seventh and Eleventh Circuits, both of which tendered decisions prior to Robinson.1 In EEOC v. CNA Ins. Companies, 96 F.3d 1039 (7th Cir. 1996), the Seventh Circuit rejected the suit of an individual in a position similar to Ford's. Litigating on behalf of the former employee, the EEOC argued that the individual was eligible to sue under Title I by arguing that an analogy may be drawn to decisions allowing former employees to sue employers for retaliation under Title VII. The Seventh Circuit rejected this argument by noting that no discrimination against the plaintiff occurred during her employment, while, in the Title VII retaliation situation, actual harm occurred by virtue of the retaliation. As the Seventh Circuit wrote, "[N]othing happened that discriminated against her during the time she was working at CNA. The only thing that occurred was CNA's 1985 decision to reduce the long-term benefits available to all of its employees for mental health problems." Id. at 1045. However, the Seventh Circuit's brief analysis conflates two issues, the first being whether the individual could sue regarding fringe benefits while completely disabled, and the second being whether the individual's suit had merit and was based upon actual discrimination. The Seventh Circuit essentially declined to find the individual eligible to sue because her suit lacked merit. Therefore, we do notfind the Seventh Circuit's reasoning persuasive regarding whether Ford is eligible to sue in the instant case as opposed to whether her suit has merit.2

We also disagree with the Eleventh Circuit's ruling in Gonzales v. Garner Food Services, Inc., 89 F.3d 1523 (11th Cir. 1996). In Gonzales, as in the instant case, a disabled former employee sued his former employer under the ADA regarding alleged discrimination in disability benefits. The Eleventh Circuit recognized the possible analogy between the Title VII retaliation context and the ADA situation, but it refused to adopt this analogy and to grant the plaintiff permission to sue. Instead, the Eleventh Circuit argued that, "[a]bsent clearly expressed legislative intent to the contrary, the plain language of the statute should be conclusive." Id. at 1528. The Eleventh Circuit concentrated on what it believed to be the plain meaning of the ADA, that only currently employable individuals could sue. However, it failed to address the possibility that the disparity between the rights created by the ADA and the apparent legal remedy fashioned by the ADA creates an ambiguity in the eligibility requirements for obtaining a remedy.

In sum, we respectfully disagree with the district court and sister courts of appeals. We find that Title I of the ADA does permit disabled individuals to sue their former employers regarding their disability benefits. We reach this conclusion because the ADA's proscription of discrimination in fringe benefits generates the need for disabled individuals to have legal recourse against such discrimination and exposes the temporal ambiguity in the ADA's definition of "qualified individual with a disability[.]" We resolve this ambiguity in favor of a broad temporal interpretation of "qualified individual with a disability[,]" that disabled former employees, no longer able to work with or without reasonable accommodations, can sue their former employers concerning alleged discrimination in their package of disability benefits. Our impetus for this conclusion also comes from the Supreme Court's Robinson

decision allowing former employees to sue under Title VII of the Civil Rights Act of 1964.

ii.

Having established Ford's eligibility to sue under Title I, we must now ascertain whether she states a claim that survives the defendants' Rule 12(b)(6) motion. Ford essentially claims that the disparity between benefits for mental and physical disabilities violates Title I of the ADA. However, Ford's argument does not support a finding of discrimination under Title I.

While the defendants' insurance plan differentiated between types of disabilities, this is a far cry from a specific disabled employee facing differential treatment due to her disability. Every Schering employee had the opportunity to join the same plan with the same schedule of coverage, meaning that every Schering employee received equal treatment. So long as every employee is offered the same plan regardless of that employee's contemporary or future disability status, then no discrimination has occurred even if the plan offers different coverage for various disabilities. The ADA does not require equal coverage for every type of disability; such a requirement, if it existed, would destabilize the insurance industry in a manner definitely not intended by Congress when passing the ADA.

This analysis is supported by Supreme Court and Third Circuit precedent concerning the Rehabilitation Act of 1973, 29 U.S.C.§ 794 (1994), to which we may look for guidance in interpreting the ADA. See Gaul v. Lucent Technologies, Inc., 134 F.3d 576, 580 (3d Cir. 1998). In Alexander v. Choate, 469 U.S. 287, 105 S. Ct. 712 (1985), plaintiffs sued in response to the Tennessee Medicaid

program's reduction in the number of inpatient hospital days for which it would pay. The plaintiffs claimed that the reduction would have a disproportionate effect on handicapped individuals since they would require longer inpatient care than non-handicapped individuals. However, the Supreme Court held that the limit on inpatient hospital care was "neutral on its face[ ]" and did not "distinguish between those whose coverage will be reduced and those whose coverage will not on the basis of any test, judgment, or trait that the handicapped as a class are less capable of meeting or less likely of having." Id. at 302, 105 S. Ct. at 720-21. According to the Supreme Court, handicapped citizens did not suffer from discrimination because both handicapped and non-handicapped individuals were "subject to the same durational limitation." Id. at 302, 105 S. Ct. at 721.

Building on Alexander, the Supreme Court in Traynor v. Turnage, 485 U.S. 535, 108 S. Ct. 1372 (1988), dismissed a challenge to a federal statute precluding the Veterans Administration from granting extensions to a ten-year delimiting period for veterans to claim their benefits if the veterans' disabilities arose from their own willful misconduct, defined by regulations as including alcoholism. The Supreme Court rejected the argument that the statute discriminated against one type of disability, namely alcoholism. "There is nothing in the Rehabilitation Act that requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons." Id. at 549, 108 S. Ct. at 1382.

We have likewise held, in the context of the Rehabilitation Act, that a state's medical assistance statute need not treat every disability equally. In Doe v. Colautti,

592 F.2d 704 (3d Cir. 1979), we dismissed a challenge to a Pennsylvania statute that provided unlimited hospitalization for physical illness in a private hospital but restricted hospitalization for mental illness in private mental hospitals. We rejected the argument that the differential level of benefits violated the Rehabilitation Act by noting that, "[i]n the treatment of their physical illnesses, the mentally ill receive the same benefits as everyone else. A mental patient with heart disease, for instance, is as entitled to benefits for treatment of the heart disease as would be a person not mentally ill." Id. at 708. Our holding in Doe is supported by the D.C. Circuit's decision in Modderno v. King, 82 F.3d 1059 (D.C. Cir. 1996), cert. denied, ___ U.S. ___, 117 S. Ct. 772 (1997), in which the D.C. Circuit rejected a challenge brought by a former spouse of a foreign service officer against the Foreign Service Benefit Plan under the Rehabilitation Act based upon the plan's lower level of benefits for mental illness as compared to physical illness.

Aside from Supreme Court and Third Circuit precedent in the Rehabilitation Act context, claims under the ADA similar to Ford's have been rejected by three courts of appeals in published opinions. While we disagree with the Seventh Circuit's reasoning in CNA regarding the plaintiff's eligibility to sue, we agree with its discussion regarding the merits of the plaintiff's claim. In rejecting the plaintiff's challenge to the disparity between benefits for mental and physical illnesses, the Seventh Circuit stated:

> One of those terms, conditions, or privileges of employment may be a pension plan, but there is no claim here that CNA discriminated on the basis of disability in offering its pension plan to anyone. It did not charge higher prices to disabled people, on the

> theory that they might require more in benefits. Nor did it vary the terms of its plan depending on whether or not the employee was disabled. All employees--the perfectly healthy, the physically disabled, and the mentally disabled--had a plan that promised them long-term benefits from the onset of disability until age 65 if their problem was physical, and long-term benefits for two years if the problem was mental or nervous. . . .
>
> [The plaintiff] raises a different kind of discrimination claim, more grist for the ERISA mill or the national health care debate than for the ADA. She claims that the plan discriminates against employees who in the future will become disabled due to mental conditions rather than physical conditions; their present dollars (unbeknownst to them) are buying only 24 months of benefits, instead of benefits lasting much longer. However this is dressed up, it is really a claim that benefit plans themselves may not treat mental health conditions less favorably than they treat physical health conditions. Without far stronger language in the ADA supporting this result, we are loath to read into it a rule that has been the subject of vigorous, sometimes contentious, national debate for the last several years. Few, if any, mental health advocates have thought that the result they would like to see has been there all along in the ADA.

CNA, 96 F.3d at 1044 (citations omitted). Likewise, in Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674 (8th Cir. 1996), the Eighth Circuit rejected a challenge under the ADA to an insurance plan that denied coverage for infertility. Analogizing the infertility exclusion to differential benefits for mental and physical illnesses, the Eighth

Circuit stated, "Insurance distinctions that apply equally to all insured employees, that is, to individuals with disabilities and to those who are not disabled, do not discriminate on the basis of disability." Id. at 678. Finally, the Sixth Circuit in Parker rejected a claim similar to Ford's made against the same defendants as in the instant case. As the Sixth Circuit held, "Because all the employees at Schering-Plough, whether disabled or not, received the same access to the long-term disability plan, neither the defendants nor the plan discriminated between the disabled and the able bodied." 121 F.3d at 1015-16; cf. Brennen v. Comptroller of the State of N.Y., 100 F.3d 942, 1996 WL 19057 (2d Cir. 1996) (unpublished table decision) (benefits extended to one category of disabled persons need not be extended to all other categories).

The cases finding no violation of the ADA by a disparity in benefits between mental and physical disabilities are supported by the ADA's legislative history. As the Senate Labor and Human Resources Committee report states:

> In addition, employers may not deny health insurance coverage completely to an individual based on the person's diagnosis or disability. For example, while it is permissible for an employer to offer insurance policies that limit coverage for certain procedures or treatments, e.g., only a specified amount per year for mental health coverage, a person who has a mental health condition may not be denied coverage for other conditions such as for a broken leg or for heart surgery because of the existence of the mental health condition. A limitation may be placed on reimbursements for a procedure or the types of drugs or procedures covered[,] e.g., a limit on the number of x-rays or non-coverage of experimental drugs or

> procedures; but, that limitation must apply to persons with or without disabilities. All people with disabilities must have equal access to the health insurance coverage that is provided by the employer to all employees.

S. Rep. No. 101-116, at 29 (1989).

In addition, legislative history subsequent to the ADA's passage evinces that Congress did not believe that the ADA mandated parity between mental and physical disability benefits. In 1996, the Senate defeated an amendment to the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified primarily in Titles 18, 26 and 42 of the U.S. Code), which would have mandated parity in insurance coverage for mental and physical illnesses. Such an amendment would have been unnecessary altogether if the ADA already required such parity. See 142 Cong. Rec. §9477-02 (daily ed. Aug. 2, 1996) (statement of Sen. Heflin); see also CNA, 96 F.3d at 1044. Furthermore, Congress then passed the Mental Health Parity Act of 1996, Pub. L. No. 104-204, Title VII, 110 Stat. 2944 (1996) (codified at 29 U.S.C.§ 1185a and 42 U.S.C. § 300gg-5), which mandates, inter alia, that a health insurance plan containing no annual or lifetime limit for medical benefits cannot have such limits on mental health. Such congressional action reveals both that the ADA does not contain parity requirements and that no parity requirements for mental and physical disability benefits have been enacted subsequent to the ADA.

iii.

Ford attempts to buttress her challenge to the disparity

between benefits for mental and physical disabilities by pointing to section 501(c) of the ADA, which contains the "safe harbor" provision covering the insurance industry. This section, codified at 42 U.S.C. § 12201(c), reads as follows:

> (c) Insurance
>
> Subchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict --
>
> (1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
>
> (2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
>
> (3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.
>
> Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapter [sic] I

and III of this chapter.

42 U.S.C. § 12201(c). Ford essentially claims that, once she presents a prima facie case alleging discrimination in disability benefits, Schering and MetLife must present actuarial data demonstrating that their plan is not a "subterfuge[.]" Hence, according to Ford, the district court erred in granting the defendants' Rule 12(b)(6) motion since the defendants had not offered data justifying the actuarial basis for the disparity in benefits.

Ford's argument must fail, however, since it runs contrary to Supreme Court precedent, ignores our statutory duty regarding insurance regulation and distorts the role of this court. First, Ford's argument that Schering and MetLife must justify their insurance plan contradicts the Supreme Court's interpretation of a provision similar to section 501(c) in the context of the Age Discrimination in Employment Act (ADEA), Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified at 29 U.S.C. § 621 et seq. (1994)). Prior to Congress's elimination of the term "subterfuge" from the ADEA in 1990, see Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, 104 Stat. 978, the ADEA granted an exemption from the ADEA's prohibition of age discrimination to an employee benefit plan that was not "a subterfuge[.]" 29 U.S.C. § 623(f) (1988). In Public Employees Retirement Sys. of Ohio v. Betts, 492 U.S. 158, 109 S. Ct. 2854 (1989), the Supreme Court rejected a challenge to an insurance plan that rendered covered employees ineligible for disability retirement once they reached age sixty. Relying on its decision in United Air Lines, Inc. v. McMann, 434 U.S. 192, 98 S. Ct. 444 (1977), the Supreme Court concluded that the term "subterfuge" must be given its ordinary meaning of " `a scheme, plan, stratagem, or artifice

of evasion.' " Betts, 492 U.S. at 167, 109 S. Ct. at 2861 (quoting McMann, 434 U.S. at 203, 98 S. Ct. at 450). In addition, the Supreme Court found that requiring an insurance company to justify its coverage scheme had no basis in the statutory language. See id. at 170-71, 109 S. Ct. at 2863; see also McMann, 434 U.S. at 203, 98 S. Ct. at 450.

The Supreme Court's definition and analysis of the ADEA's use of the term "subterfuge" are applicable to the ADA's use of the term "subterfuge[.]" Congress enacted section 501(c) of the ADA in 1990, see Pub. L. No. 101-336, 104 Stat. 369 (1990), while the Supreme Court decided Betts in 1989. Congress therefore is presumed to have adopted the Supreme Court's interpretation of "subterfuge" in the ADEA context when Congress enacted the ADA. "[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." Lorillard v. Pons, 434 U.S. 575, 581, 98 S. Ct. 866, 870 (1978); see Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 59, 31 S. Ct. 502, 515 (1911) ("[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary."). "Had Congress intended to reject the Betts interpretation of subterfuge when it enacted the ADA, it could have done so expressly by incorporating language for that purpose into the bill that Congress voted on and the President signed." Krauel, 95 F.3d at 679; accord Modderno, 82 F.3d at 1064. Accordingly, as the Supreme Court held in the ADEA context, the term "subterfuge" does not require an insurance company to justify its policy coverage after a

plaintiff's mere prima facie allegation.

The second reason that Ford's argument must fail is that it ignores our statutory duty under the McCarran-Ferguson Act regarding insurance cases. Pursuant to that Act, "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance . . . ." 15 U.S.C. § 1012(b) (1994). The ADA does not "specifically relate[ ] to the business of insurance[,]" id., and does not mention the term "insurance" in its introductory section entitled "Findings and purpose[.]" See 42 U.S.C. § 12101. Accordingly, we will not construe section 501(c) to require a seismic shift in the insurance business, namely requiring insurers to justify their coverage plans in court after a mere allegation by a plaintiff. This second reason is integrally related to the third reason Ford's argument regarding section 501(c) fails, namely that requiring insurers to justify their coverage plans elevates this court to the position of super-actuary. This court is clearly not equipped to become the watchdog of the insurance business, and it is unclear exactly what actuarial analysis the defendants would have to produce to disprove the charge of "subterfuge[.]" See Modderno, 82 F.3d at 1062-63 (noting confusion as to exactly what actuarial data would be sufficient).

B.

Ford's second claim against Schering and MetLife is that the disparity in benefits for mental and physical disabilities violates Title III of the ADA. Title III reads in relevant part as follows: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the

goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). Relying on the principle that courts should avoid interpreting statutes in a manner rendering some words redundant, see United States v. Alaska, ___ U.S. ___, ___, 117 S. Ct. 1888, 1918 (1997), Ford and the U.S. Dept. of Justice as amicus essentially argue that the phrase "services, . . . privileges, [and] advantages" covers discrimination in realms different than physical access to facilities or else these words would be superfluous. Ford can also cite to the ADA itself for the proposition that an "insurance office[ ]" is a public accommodation under Title III. 42 U.S.C. § 12181(7)(F) (listing examples of public accommodations including "insurance office[]").

The fact that an insurance office is a public accommodation, however, does not mean that the insurance policies offered at that location are covered by Title III. In the instant case, Schering and MetLife offered disability benefits to Ford in the context of her employment at Schering, meaning that the disability benefits constituted part of the terms and conditions of Ford's employment. Terms and conditions of employment are covered under Title I, not Title III. "Title III is not intended to govern any terms or conditions of employment by providers of public accommodations or potential places of employment; employment practices are governed by title I of this legislation." S. Rep. No. 101-116, at 58 (1989); see H.R. Rep. No. 101-485, pt. 2, at 99 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 382. Therefore, Ford cannot state a claim against her employer, Schering, pursuant to Title III. See Parker, 121 F.3d at 1015.

Regarding MetLife, the disability benefits that Ford challenges do not qualify as a public accommodation and thus do not fall within the rubric of Title III. The plain meaning of Title III is that a public accommodation is a place, leading to the conclusion that " `[i]t is all of the services which the public accommodation offers, not all services which the lessor of the public accommodation offers[,] which fall within the scope of Title III.' " Id. at 1011 (quoting Stoutenborough v. National Football League, Inc., 59 F.3d 580, 583 (6th Cir. 1995) (a television broadcast is not covered by Title III)). This is in keeping with the host of examples of public accommodations provided by the ADA, all of which refer to places. See 42 U.S.C. § 12181(7).3 Since Ford received her disability benefits via her employment at Schering, she had no nexus to MetLife's "insurance office" and thus was not discriminated against in connection with a public accommodation. Furthermore, the "goods, services, facilities, privileges, advantages, or accommodations" concerning which a disabled person cannot suffer discrimination are not free-standing concepts but rather all refer to the statutory term "public accommodation" and thus to what these places of public accommodation provide. Ford cannot point to these terms as providing protection from discrimination unrelated to places.

Restricting "public accommodation" to places is in keeping with jurisprudence concerning Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (1994). Title II proscribes racial and religious discrimination in"the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . ." 42 U.S.C. § 2000a(a). This proscription has been limited to places rather than including membership in an organization, see Welsh v. Boy Scouts of Am., 993 F.2d

1267, 1269-75 (7th Cir. 1993), and rather than encompassing an organization's operations unconnected to any physical facility. See Clegg v. Cult Awareness Network, 18 F.3d 752, 755-56 (9th Cir. 1994).

Confining "public accommodation" to places is also in keeping with the Dept. of Justice's regulations to this effect:

> The purpose of the ADA's public accommodations requirements is to ensure accessibility to the goods offered by a public accommodation, not to alter the nature or mix of goods that the public accommodation has typically provided. In other words, a bookstore, for example, must make its facilities and sales operations accessible to individuals with disabilities, but is not required to stock Brailled or large print books. Similarly, a video store must make its facilities and rental operations accessible, but is not required to stock closed-captioned video tapes.

28 C.F.R. pt. 36, app. B, at 640 (1997). Just as a bookstore must be accessible to the disabled but need not treat the disabled equally in terms of books the store stocks, likewise an insurance office must be physically accessible to the disabled but need not provide insurance that treats the disabled equally with the non-disabled. While the Dept. of Justice has issued other documents stating that Title III does cover the substance of insurance contracts, see Dept. of Justice, Title III Technical Assistance Manual: Covering Public Accommodations and Commercial Facilities § III-3.11000, at 19 (Nov. 1993) ("Insurance offices are places of public accommodation and, as such, may not discriminate on the basis of disability in the sale of insurance contracts or in the terms or conditions of the insurance contracts

they offer."), such an interpretation is "manifestly contrary" to the plain meaning of Title III and, accordingly, is not binding on this court. Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 844, 104 S. Ct. 2778, 2782 (1984); see Parker, 121 F.3d at 1012 n.5. Furthermore, since we find the plain meaning of "public accommodation" and 42 U.S.C. § 12182(a) to be clear, we have no need to analyze the ADA's legislative history.

We also note that, by aligning ourselves with the Sixth Circuit's Parker decision regarding the definition of "public accommodation[,]" we part company with the First Circuit in this regard. In Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England, Inc., 37 F.3d 12 (1st Cir. 1994), the First Circuit held that Title III is not limited to physical structures. The First Circuit pointed to the inclusion of "travel service" in the list of public accommodations and noted:

> Many travel services conduct business by telephone or correspondence without requiring their customers to enter an office in order to obtain their services. Likewise, one can easily imagine the existence of other service establishments conducting business by mail and phone without providing facilities for their customers to enter in order to utilize their services. It would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result.

Id. at 19 (citing 42 U.S.C. § 12181(7)(F)). However, as the Sixth Circuit pointed out in Parker, 121 F.3d at 1014, the

First Circuit failed to read the examples of public accommodations that piqued the First Circuit's interest in the context of the other examples of public accommodations. The litany of terms, including "auditorium," "bakery," "laundromat," "museum," "park," "nursery," "food bank," and "gymnasium[ ]" refer to places with resources utilized by physical access. 42 U.S.C. § 12181(7)(D)-(F), (H)-(L). Pursuant to the doctrine of noscitur a sociis, the terms that the First Circuit finds ambiguous should be interpreted by reference to the accompanying words of the statute "to avoid the giving of unintended breadth to the Acts of Congress." Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307, 81 S. Ct. 1579, 1582 (1961). Accordingly, we do not find the term "public accommodation" or the terms in 42 U.S.C. § 12181(7) to refer to non-physical access or even to be ambiguous as to their meaning.

In sum, Ford fails to state a claim under Title III of the ADA since the provision of disability benefits by MetLife to Schering's employees does not qualify as a public accommodation.

IV.

For the above reasons, we will affirm the September 12, 1996, order of the district court dismissing Ford's complaint for failure to state a claim. Unlike the district court, we find that Ford is eligible to sue under Title I. However, Ford fails to state a claim under Titles I or III and errs in asserting that the "safe harbor" provision of Title V requires insurance companies to justify their coverage plans after a plaintiff's prima facie allegation.

Footnotes

1. The Sixth Circuit in Parker v. Metropolitan Life Ins. Co., 99 F.3d 181 (6th Cir. 1996), analyzed whether a plaintiff was eligible to sue under

Title I. However, that decision was vacated by the granting of the plaintiff's petition for rehearing en banc. See 6th Cir. R. 14(a). The en banc decision did not address the Title I issue because it was not raised by the plaintiff's petition for rehearing en banc. See Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1009 n.2 (6th Cir. 1997) (en banc), cert. denied, ___ U.S. ___, 118 S. Ct. 871 (1998).

2. The EEOC also argued in CNA that the disabled person was in the "employment position" of "disability benefit recipient." Id. at 1043 (internal quotation marks omitted). According to the Seventh Circuit, the EEOC claimed that, "[b]ecause CNA imposes no job-related duties on any of the beneficiaries of its long-term disability plan, [the plaintiff] by definition can perform the essential functions of her position: there are none . . . ." Id. at 1043-44. The Seventh Circuit rejected that argument because, in its words, "[a]n `employment position' is a job[,]" id. at 1044, meaning that receiving disability benefits did not qualify as an employment position. However, Ford does not offer this argument in the instant litigation.

3. Section 12181(7) reads as follows:

The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce--

(A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

42 U.S.C. § 12181(7).

ALITO, Circuit Judge, concurring in the judgment:

I agree with the majority that Ford fails to state a claim under the Americans with Disabilities Act (ADA). However, I reach this conclusion based solely on the insurance "safe harbor" provision located in section 501(c) of the ADA. See 42 U.S.C. § 12201(c).

Section 501(c) provides that Titles I and III of the ADA "shall not be construed to prohibit or restrict" the terms of a bona fide insurance plan. 42 U.S.C. § 12201(c). This exemption applies so long as it is not "used as a subterfuge to evade the purposes of" the ADA. Id. As the majority recognizes, the term "subterfuge" must be construed in accordance with the Supreme Court's decision in Public Employees Retirement Sys. of Ohio v. Betts, 492 U.S. 158 (1989). See Maj. Op. at 18-19. Betts concerned a "safe harbor" provision that exempted fringe benefit plans from coverage by the Age Discrimination in Employment Act (ADEA). See 29 U.S.C. § 623(f)(2) (1988).1 Like section 501(c), the ADEA exemption provided that it would not protect a plan that was "a subterfuge to evade the purposes of" the Act. Id. In interpreting this language, the Court concluded that an employee benefit plan adopted prior to the enactment of the ADEA could not be considered a subterfuge to evade the purposes of the ADEA. Betts, 492 U.S. at 166-69 (reaffirming the holding of United Air Lines, Inc. v. McMann, 434 U.S. 192, 203 (1977)). Under the same reasoning, the insurance plan challenged by Ford cannot be considered a subterfuge to evade the purposes of the ADA since the plan was adopted prior to the enactment of the ADA.2 See Modderno v. King, 82 F.3d 1059, 1063-1065 (D.C. Cir. 1996) (holding that an insurance plan enacted prior to the importation of ADA standards into the

Rehabilitation Act could not be considered a subterfuge to evade those standards). Accordingly, the defendants' plan is insulated from attack by section 501(c).

I further note that Ford's complaint as currently framed fails to allege that the defendants ever developed a"specific intent" to evade the purposes of the ADA. See Betts, 492 U.S. at 171. In Betts, the Court wrote:

> [W]hen an employee seeks to challenge a benefit plan provision as a subterfuge to evade the purposes of the Act, the employee bears the burden of proving that the discriminatory plan provision actually was intended to serve the purpose of discriminating in some non-fringe-benefit aspect of the employment relation.

Betts, 492 U.S. at 181. Under this reading of "subterfuge," Ford could not successfully challenge the defendants' insurance plan unless she could show that it was intended to serve the purpose of discriminating in some non-insurance-benefit aspect of her relationship with the defendants. Ford's complaint contains no such allegation of intent.

Given the effect of section 501(c) on Ford's claims, I do not think that it is necessary for the court to conclude that distinguishing between people with different disabilities for insurance purposes is not discrimination based on disability. See Maj. Op. at 12-13. In fact, it would seem that making such distinctions does constitute discrimination in the most basic sense of the word. See Webster's Third New International Dictionary at 648 (defining discrimination as "the making or perceiving of a distinction or difference"). However, we need not wrestle with the question of what might or might not constitute unlawful insurance

discrimination under the ADA had Congress not addressed the issue; Congress did address the issue and provided an explicit answer in section 501(c).

In light of the ease with which Ford's claims can be resolved under section 501(c), I would not reach the more difficult issues of: 1) whether a former employee who can no longer work can meet Title I's "qualified individual with a disability" requirement; and 2) whether Title III's public accommodation provision guarantees anything more than physical access. These issues have divided the circuits, and I would reserve judgment until we are confronted with a case in which the unique considerations of insurance plans are not at stake.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Footnotes

1. Following Betts, section 623(f)(2) was amended by the Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, S 103(1), 104 Stat. 978.

2. The disputed portions of the plan have been in effect since at least 1985. App. at 69, 87. The ADA was enacted in 1990. See 42 U.S.C. § 12101.

Three justices in McMann rejected the majority's conclusion that a plan adopted prior to the enactment of the ADEA could not be a subterfuge to avoid the purposes of that Act.

See 434 U.S. at 204-05 (White, J., concurring); id. at 219 n.13 (Marshall, J., joined by Brennan,

J., dissenting). According to these justices, a pre-Act plan could become a subterfuge if it was maintained after the passage of the ADEA in order to evade the purposes of that Act. One could argue that this position is stronger under the ADA's "safe harbor" provision due to difference in the statutory language. Compare 29 U.S.C. § 623(f) ("is not a subterfuge to evade the purposes of" the ADEA) (emphasis added) with 42 U.S.C. § 1201(c) ("shall not be used as a subterfuge to evade the purposes of" the ADA) (emphasis added). However, I do not believe that this change is sufficient to avoid the mandate of McMann and Betts.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Civ. No. 96—1991 (DRD)
OPINION

COLLEEN FORD,

Plaintiff,

v.

SCHERING-PLOUGH CORPORATION;SCHERING CORPORATION; and METROPOLITAN LIFE INSURANCE COMPANY,

Defendants.

Appearances

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DEBEVOISE. Senior District Judge.

Defendants Metropolitan Life Insurance Company ("MetLife"), Schering-Plough Corporation and Schering Corporation (collectively "Schering") move to dismiss, or in the alternative for summary judgment on, the plaintiff's, Colleen Ford, complaint. For the reasons set forth below, defendants' motion to dismiss will be granted.

BACKGROUND

Plaintiff Colleen Ford was an employee of Schering from 1975 to May 1992, when she became totally disabled because of a mental disorder which persists to date. As a Schering employee, plaintiff was covered for long term disability (LTD) benefits under the employee welfare benefits plan ("Plan") provided to Schering employees. MetLife issued a Group Policy to Schering to eligible Plan participants. Under the Plan, plaintiff was entitled to monthly LTD

benef.its in November 1992, six months after she became disabled.'

The Plan provides, and has provided since at least 1985, that benefits for mental disabilities, such as plaintiff's disability, terminate after twenty-four months. Benefits are available for physical disabilities until age sixty—five, so long as the disability persists. Plaintiff received benefits under the Plan for 24 months, until November 23, 1994, when the benefits were terminated in accordance with the terms of the Plan.

On November 8, 1995, the plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). On January 31, 1996, the EEOC issued plaintiff a "right-to-sue" letter. On April 29, 1996, plaintiff filed a three-count complaint against Schering and Hetlife, alleging unlawful discrimination under the Americans with Disabilities Act of 1990, 42 U.S.C.§ 12101 et *seq.* ("ADA"). The essence of plaintiff's complaint is that the defendants violated plaintiff's rights under the ADA because the Plan, as part of its design, includes a provision that long term disability benefits terminate after twenty-four months for individuals with mental disabilities, while individuals with physical disabilities are eligible for benefits until age sixty-five if their physical disability persists.

Presently, both Schering and MetLife move to dismiss .the plaintiff's complaint for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). Alternatively, the defendants move for summary judgment.

RULE 12(b) (6) STANDARD

Pursuant to Rule 12(b)(6), a plaintiff's complaint must be dismissed for failure to state a claim if a defendant demonstrates "beyond a doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45—46 (1957); Craftmatic Securities Litigation v Kraftsow, 890 F.2d 628, 634 (3d Cir. 1989); Johnsrud v. Carter, 620 F.2d 29, 33 (3d Cir. 1980). All allegations set forth in the complaint must be accepted as true, see Cruz v. Beto, 405 U.s. 319, 322 (1972), and all reasonable inferences must be drawn in the plaintiff's favor. Schrob v. Catterson, 948 F.2d 1402, 1405 (3d Cir. 1991). on a 12(b)(6). motion, the district court is limited to the facts alleged in the complaint, not those raised for the first time by counsel in its legal memorandum. Hauptmann v. Wilentz, 570 F.Supp. 351, 364 (D.N.J. 1983), aff'd without opinion, 770 F.2d 1070 (3d Cir. 1985), cert. denied, 474 U.S. 1103 (1986); Seevers v. Arkenberg, 726 F. Supp. 1159, 1165 (S.D. Ind. 1989)("This court is not at liberty, however, to consider allegations which do not appear in the complaint, but which are averred only in legal briefs."). The Third Circuit, however, has held that a "court may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss," without converting the motion into a motion for summary judgment, "if the plaintiff's claims are based on the document." Pension Ben. Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993), cert. denied, 114 S.Ct. 687 (1994).

DISCUSSION

This court has jurisdiction over the present case pursuant to 28 U.S.C. § 1331 (federal question).

Plaintiff's Claims Under Title I of the ADA

Title I of the ADA addresses disability discrimination by employers; it forbids discrimination against individuals with disabilities in the employment context. Section 102(a) of Title I of the ADA states the general rule against discrimination as follows:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a). (Emphasis added).

A qualified individual with a disability is defined, in pertinent part, as:

> [A]n individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. 42 U.S.C.§ 12111(8). (Emphasis added).

In the present case, it is undisputed that plaintiff is totally disabled. Defendants assert that since plaintiff is

totally disabled and cannot perform the essential functions of any employment positions which she holds or desires, by definition she is not a "qualified individual" under the ADA and thus does not have standing to bring a Title I claim.

In support of their position, defendants cite two recent cases with very similar facts and issues to the present case, Parker v. Metropolitan Life, Ins. Co., 875 F. Supp. 1321 (W.D. Tenn. 1995), appeal filed, No. 95—5269 (6th Cir. Feb. 15, 1995), and EEOC v. CNA Insurance Companies, 1996 WL 26879 (N.D.Ill 1996), appeal pending, No. 96-1304 (7th Cir.). *Parker,* a case with exact same defendants and issues as the present case, involved a challenge to a long-term disability plan that provided less benefits for mental disabilities than for physical disabilities. Id. at 1325. The plaintiff in Parker, who had worked for one of the defendants since 1981, had become disabled in 1990. Id. at 1324. The plaintiff remained disabled and was no longer working at the time the action was brought. Id. The defendants argued that the plaintiff was not entitled to the ADA's protection because she was not a "qualified individual with a disability.' Id. at 1325.

The Court, relying on the Eighth Circuit's interpretation of the Rehabilitation Act in Beau ford v. Father Flanagan 's Boys' Home, 831 F.2d 768 (8th Cir. 1987), cert. denied, 485 U.s. 938 (1988), dismissed the plaintiff's claims under Title I of the ADA. Parker, 875 F.Supp. at 1326. The court stated that "the plain language of the Act clearly indicates that the ADA was designed to afford relief only to those individuals with disabilities who can perform the essential functions of the job that they hold or seek.' Id. In addition, the court stated that other courts had found that "only persons with disabilities who are

'qualified' for the position they hold or desire may state a claim for discrimination under the Act.' Id. (citing Tyndall V. Nat. Educ. Centers, 31 F.3d 209 (4th Cir. 1994)).

The facts of EEOC v. CNA are also remarkably similar to those in Parker and to those in the present case. In *CNA*, a former employee had her LTD benefits for mental disability limited to two years while benefits for all other disabilities were to be paid to age sixty-five. The EEOC brought suit on behalf of the former employee to enjoin the insurance companies from ceasing to pay disability benefits after the two years limit. The *CNA* court followed the Parker analysis and reached the same result, i.e., a plaintiff who is totally disabled and who cannot perform the essential functions of any employment position is not a "qualified individual" under the ADA and thus has no standing to sue under Title I (see also a recent case, Gonzales v. Garner Food Services, Inc., No. 95—8533, 1996 U.S. App. LEXIS 19012 (11th Cir. Aug. 2, 1996)). I am not persuaded that these courts erred.

Applying Parker, CNA, and Gonzalez to the case at hand yields a similar result. It is undisputed that plaintiff here is totally disabled; thus she is not a "qualified individual with a disability" within the definition of Title I of the ADA. Therefore, plaintiff has no standing to sue under Title I of the ADA. Accordingly, plaintiff.'s claim under Title I as it pertains to defendants Schering and MetLife will be dismissed.[2]

Plaintiff's Claims Under Title III of the ADA

Title III is concerned with public accommodations and access for people with disabilities. It does not concern discrimination in employment. The Act defines public

accommodation to include a "aundromat, dry-cleaner, bank, ... insurance office, professional office of a health care provider, hospital, or other service establishment," 42 U.S.C. § 12181(7)(F). An issue similar to that in the present case arose in Parker, supra. The Parker court concluded that there was no nexus whatsoever between the plaintiff's alleged discrimination and her inability to make physical use of any of defendant's services. *Id.* at 1327. The court found that Title III only addresses discrimination

based on a disabled person's physical abilities to make use of the goods and services of a place of public accommodation. Id. at 1328. Likewise, in the present case, there is no relationship between Ford's alleged discrimination and her ability to make physical use of any of MetLife's services. Both handicapped and unhandicapped employees of Schering were able to subscribe to the Schering LTD plan. Accordingly, Ford has failed to state a claim under Title III of the ADA upon which relief can be granted.

Plaintiff's Claims Under Title V of the ADA

42 U.S.C. § 12201(c), contained in Title V of the ADA and entitled "Construction," provides in relevant part:

> Subchapters I through III of this chapter and Title IV of the Act shall not be construed to prohibit or restrict -
>
> (1) an insurer, hospital or medical servicecompany,. health maintenance

> organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
>
> (2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bonafide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
>
> (3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bonafide benefit plan that is not subject to State laws that regulate insurance.
>
> Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapters I and III of this chapter.

This provision, also known as "Section 501(c)," however, does not create a separate cause of action under the ADA. Section 501(c) is merely one step in the analytic framework under Title I of the ADA. In discussing the significance of Section 501(c), the Parker court noted that:

> The legislative history of Title V reiterates that the main purposes of the ADA include prohibiting discrimination in employment,

> public services, and places of public accommodation and that no provisions of the ADA should affect the way the insurance industry does business in accordance with the State laws and regulations under which it is regulated... Thus, Title V governs the interplay between the Act's anti-discrimination provisions in Title I, II and III and health insurance plans offered by employers to their workers, and nothing in the legislative history of the Act suggests that claims may be brought independently under this section of the ADA. Parker, 875 F.Supp. at 1327 n.7.

Consistent with this reasoning, plaintiff cannot state an independent claim under Section 501(c). Accordingly, it will be dismissed.

There is persuasive authority suggesting that a provision for different benefit levels in a health or disability plan available equally to those who are handicapped and those who are not does not violate the ADA. Brenner v. Comtroller of the State of New York, 1996 U.S. App. LEXIS 2430 (2d Cir Jan. 16, 1996); Modderno **V.** King, 82 L.3d 1059 (D.C.C. 1996); Harding Winn-Dixie Stores, Inc., 907 L.Supp. 386 (M.D. Fla. 1995); EEOC Interim Policy Guidance, June 8, 1993, reprinted in Americans With Disabilities Act Manual (BHA) at 70; 1051—1053. Because I have concluded on the basis of the *facts* alleged in the complaint that plaintiff does not have standing under the ADA to raise her Title I claim, offering the LTD Plan did not violate Title III, and Title V does not create a separate cause of action under ADA, it is unnecessary to reach the question whether the disparity in the Schering Plan's level of disability

benefits for mental and physical conditions violates the ADA.

CONCLUSION

For the reasons set forth above, plaintiff's complaint under Title I, III, and V of the ADA will be dismissed. An appropriate order will be issued.

s/ _____
Dickinson R. Debevoise, U.S.D.J.

Date: September 12, 1996

Footnotes

1 Plaintiff was also found to be disabled for purposes of receiving Social Security disability benefits.

2 In view of this conclusion it is unnecessary to address MetLife's and Schering's contentions that plaintiff failed to file a charge of discrimination with the EEOC within 300 days from the date of the alleged discriminatory act as required by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e— 5(e). It is also unnecessary to address MetLife's contention that it is not a "covered entity" against which a Title I claim can be brought.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 96-5674

COLLEEN V. FORD,

Appellant

v.

SCHERING-PLOUGH CORPORATION;
SCHERING CORPORATION;
METROPOLITAN LIFE INSURANCE COMPANY

Present: Mansmann, Cowen, and Alito, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on January 28, 1998.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said

District Court dated September 12, 1996 and entered September 13, 1996, be, and the same is hereby affirmed. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

Clerk

Dated: MAY 2 2 1998

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 96-5674

COLLEEN V. FORD,

Appellant

v.

SCHERING-PLOUGH CORPORATION;
SCHERING CORPORATION;
METROPOLITAN LIFE INSURANCE COMPANY

SUR PETITION FOR REHEARING

BEFORE: BECKER, Chief Judge, SLOVITER, STAPLETON, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, MCKEE, and RENDELL,
Circuit Judges

The petition for rehearing filed by appellant having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

The Statutes in Question

Title 1 of the Americans With Disabilities Act, 42 U.S.C. § 12101(b) provides in relevant part as follows:

(b) Purpose

It is the purpose of this chapter—

> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
>
> . . .
>
> (4) to invoke the sweep of congressional authority, including the power to invoke the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Title I of the Americans With Disabilities Act, 42 U.S.C. § 12102(2) provides as follows:

(2) Disability

> The term "disability" means, with respect to an individual—
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or

(C) being regarded as having such an impairment.

Title I of the Americans With Disabilities Act, 42 U.S.C. §12112(a) and (b) provides in relevant part as follows:

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes—

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

. . .

> (4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association . . .

Title III of the Americans With Disabilities Act, 42 U.S.C. § 12181(7)(F), provides as follows:

> (7) Public Accommodation
>
> The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce—
>
> > (F) a laundromat, dry cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment . . .

Title III of the Americans With Disabilities Act, 42 U.S.C. § 12182(a) provides as follows:

> (a) General Rule
>
> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any

person who owns, leases (or leases to), or operates a place of public accommodation.

Title III of the Americans With Disabilities Act, 42 U.S.C. § 12182(b) provides in relevant part as follows:

(1) General prohibition

(A) Activities

(i) Denial of participation

It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

(2) Specific prohibitions

(A) Discrimination

For purposes of subsection (a) of this section, discrimination includes—

(i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with

disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of goods, services, facilities, privileges, advantages, or accommodations being offered;

(ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations;

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied service, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden . . .

Title V of the Americans With Disabilities Act, 42 U.S.C. § 12201(c), provides as follows:

(c) Insurance

Subchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict—

(1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapter I and III of this chapter.